

CCASE:
MSHA V. GREAT WESTERN ELECTRIC

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

May 25, 1983
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. WEST 81-213-RM
WEST 81-258-M

v.

GREAT WESTERN ELECTRIC
COMPANY

DECISION

This case involves a contest of citation and a civil penalty proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The administrative law judge concluded that Great Western Electric Company violated 30 C.F.R. § 57.15-5 (1980) and assessed a civil penalty. 1/ 4 FMSHRC 1645 (September 1982) (ALJ). The major issues before the Commission are whether the judge erred in his interpretation of the standard and, if not, whether his conclusions are supported by substantial evidence. For the reasons that follow, we affirm the judge's decision.

On March 4, 1981, during an inspection of the FMC Mine in Green River, Wyoming, an MSHA inspector observed a miner installing a light fixture from a ladder without the use of a safety belt and line. The inspector issued a combined section 104(a) citation and a section 107(a) imminent danger order of withdrawal. 2/ In order to terminate the citation and order, the miner was brought down and told to wear a safety belt and line.

1/ 30 C.F.R. § 57.15-5 provides in pertinent part:

Safety belts and lines shall be worn when men work where there is danger of falling....

2 Citation and Order of Withdrawal No. 0576985 alleges:

[A]n employee of Great Western Electric Company was observed working off a ladder 18 to 20 feet from the floor. [The] employee was installing a light fixture about 4 feet above head level. [The] employee did not have a safety belt and line on. This was in the one distribution building at W2102 screen level.

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At the hearing, the parties stipulated to specific facts and procedures that would govern the case. They stipulated that the Commission has jurisdiction over the controversy. They stipulated that the employee of Great Western, a construction worker, was on a ladder 12 feet above the ground and was not wearing a safety belt and/or line. The parties agreed that the body of the miner was not totally within the rails of the ladder; specifically, his shoulders were not within the rails of the ladder. The miner's arms were outstretched toward a light fixture and both of his hands were involved with installing the light fixture. Three photographic exhibits were submitted to show the approximate position of the miner on the ladder. 3/ To the extent that the exhibits depicted a different position, the stipulations of the parties were to govern the facts. The parties agreed that the miner was skilled and experienced in the use of ladders, that he used a ladder everyday, as many as twenty different times per day, and that a significant amount of his daily work was performed on a ladder. The ladder was secured at both the top and the bottom. The parties accepted the accuracy of MSHA's penalty proposal. They also agreed that if a violation of the Act sufficient to support the section 104(a) citation were found, then the section 107(a) order of withdrawal would also stand and the proposed penalty would be paid. 4/

In his decision, the judge found that Great Western violated 30 C.F.R. § 57.15-5 and assessed a penalty of \$60. The judge determined that the pivotal issue in the case was whether there was a danger of falling and he concluded that such a danger existed. In addressing the correct test for determining whether this broad standard had been violated, he relied upon the application of an "objective 'reasonable' test". 4 FMSHRC at 1647. More specifically, the judge articulated a "conscientious safety expert" test, requiring that identification of a hazard be determined in light of common industry practices and that the precautions taken against a known hazard be those which a conscientious safety expert would take. 4 FMSHRC at 1647-48. The judge held that the skill of a miner is not a factor in determining whether a danger of falling exists, but stated that skill could be a factor in assessing a penalty as it would relate to the operator's negligence. 4 FMSHRC at 1649. On review, Great Western argues that the skill of a miner is a relevant factor in determining whether there is a danger of falling and that the stipulated facts do not support the judge's conclusion that there was such a danger.

We first address the judge's discussion regarding the correct test to be applied for determining whether 30 C.F.R. § 57.15-5 was violated. In *Alabama By-Products Corp.*, 4 FMSHRC 2128 (December

1982), the Commission interpreted a general standard by applying a "reasonably prudent person" test, stating:

...[W]e conclude that the alleged violation is appropriately measured against the standard of whether a reasonably prudent person familiar

3/ The exhibits depict a man on a ladder using both hands to hold an industrial light fixture. One of his arms is between the upper two rungs of the ladder and around a vertical rail.

4/ In light of this stipulation, no issue concerning whether the condition constituted an imminent danger under section 107(a) is before us.

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with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Id. at 2129. This approach was likewise followed in *U.S. Steel Corp.*, 5 FMSHRC 3 (January 1983), where we held that the adequacy of an operator's efforts to comply with a general standard should be evaluated by reference to an objective standard of a reasonably prudent person familiar with the mining industry and the protective purpose of the standard. Id. at 5. We conclude that the same interpretive course is appropriate in the present case. Applying this construction to the standard before us defines the applicability of the standard in terms of whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines.

The administrative law judge's decision in this case was issued prior to our decisions in *Alabama By-Products* and *U.S. Steel*. The judge applied a version of the reasonably prudent person test to the standard, but his test incorporated a higher threshold, that of a conscientious safety expert. Although the test applied by the judge differed from that articulated by the Commission, applying the law to the facts, as we do below, leads us to conclude that the judge's use of a conscientious safety expert test constituted harmless error because substantial evidence supports the judge's finding of a violation under the Commission's less stringent test. *Great Western* argues that the skill of a miner is a relevant factor in determining whether there is a danger of falling because the miner's skill defines the scope of the hazard presented. We find that such a subjective approach ignores the inherent vagaries of human behavior. Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions,

which could result in a fall. The specific purpose of 30 C.F.R. § 57.15-5 is the prevention of dangerous falls. Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). By adopting an objective interpretation of the standard and requiring a positive means of protection whenever a danger of falling exists, even a skilled miner is protected from injury. We believe that this approach reflects the proper interpretation and application of this safety standard.

That is not to say that the miner's skill is totally immaterial.

The skill of a miner may be a relevant factor in determining an appropriate civil penalty for a violation. In making work assignments and giving instructions to its employees, the amount of reliance which an operator places on the relative skills of its employees may be an indication of the operator's negligence concerning the violation. A miner's skill may also influence the probability of the occurrence of the event against which a standard is directed, and so affect that element of gravity. 5/

5/ The parties stipulated to the appropriateness of the proposed penalty if a violation were found. Therefore, we find no error in the judge's penalty assessment.

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At the hearing, the parties elected to submit the case based upon stipulated facts. In arriving at his findings of fact and conclusions of law, the administrative law judge relied on the stipulations presented to him by the parties. 4 FMSHRC at 1646. It is undisputed that the miner in question was 12 feet above the ground and was not wearing a safety belt and/or line, although he could have been tied off. The miner's shoulders were outside the uprights of the ladder, arms outstretched, with both hands involved with installing the light fixture. The photographic exhibits indicate the size of the fixture involved.

We conclude that, under the reasonable person test appropriately applied to the standard, substantial evidence supports the judge's finding of a danger of falling and a violation. The miner was standing on a ladder, his physical center of gravity was shifted to one side and both of his hands were preoccupied with installing a large light fixture. A slight shift in balance or lapse of attention might have resulted in a fall. In that event, the miner would not have been protected. His position twelve feet above the ground presented a substantial height from which to fall.

By our decision, we do not hold that on every occasion when a miner works from or travels on a ladder he must be secured by a safety belt and line. If this is the Secretary's intended approach in addressing all falling hazards associated with the use of

ladders, proper notice to the industry would be necessary before such a wide-ranging change in industrial work practices could be imposed.

Accordingly, we affirm the judge's decision. 6/

6/ Commissioner Nelson did not participate in the consideration of the disposition of this case.

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